No. 92-1292

In The

Supreme Court of the United States

October Term, 1993

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF ON THE MERITS FOR PETITIONERS

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INTRODUCTION

The heart of the Acuff-Rose argument is that 2 Live Crew took too much of "Oh, Pretty Woman" — too much of its music and too much of its market. The Respondent's Brief speaks of "excessive appropriation," "cash[ing] in," "take for themselves profits," "potential for inflicting future harm in markets . . . ." Respondent's Br. pp. 8,9,42. Respondent relies on the *Sony/Harper & Row* presumption that a commercial use is not a fair use, and maintains that the presumption applies unequivocally to parodies. The Respondent argues 2 Live Crew failed to carry its burden of proving their parody did not reduce the overall market for the Orbison-Dees original.

The record does not support the Respondent.

I.

ACUFF-ROSE FAILED TO REBUT 2 LIVE CREW'S PROOF THAT ITS "PRETTY WOMAN" WOULD NOT ADVERSELY AFFECT THE POTENTIAL MARKET FOR, OR VALUE OF, THE COPYRIGHTED WORK.

Effect on the market is, under *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566 (1985) and *Stewart v. Abend,* 495 U.S. 207, 238 (1990), the "single most important" and "central fair use factor." On that, the parties agree. Respondent's Brief at 36.

Unlike the other fair use factors which may be prone to subjective evaluations, effect upon the market is a matter of fact, not a mixed question of fact and law. The trial court in this case found that fact in favor of 2 Live Crew:

> [W]hile Acuff-Rose is not required to prove damages . . . it has not produced convincing

> evidence that any harm to any existing or potential market has occurred.

J.A. 288.

Indeed, since this case was decided on summary judgment, it comes to this Court with Acuff-Rose having failed to even create a genuine issue of material fact regarding effect on any market for its product. 2 Live Crew presented affidavits to support their fair use defense and summary judgment motion. Those affidavits addressed the effect on the market factor. J.A. 30, 93. Acuff-Rose's burden was to create a disputed issue of fact on that issue.

Acuff-Rose's failure is evident from its Brief. Nowhere in its extended discussion of this central and most important factor does it point to record evidence to support its effect on the market position. Respondent's Br. 36-42. Whatever the value of the *Sony/Harper & Row* presumption in a parody case, *proof* of effect on the market is still the *sine qua non* for a copyright owner seeking to avoid summary judgment when a defendant claiming fair use has adduced evidence of no effect on the market.

The Respondent's approach is to denigrate the Brand and Krasilovsky affidavits, and to offer a number of potential derivative uses which Acuff-Rose "might decide to" tap. Respondent's Br. at 39-40. No evidence or proof supports that conjecture. No evidence or proof supports any finding that if Respondent did "market its song in a wide range of markets for a variety of uses" the 2 Live Crew's song adversely affected any potential market beckoning Acuff-Rose. The Respondent's appellate attack on Brand and Krasilovsky does not meet its trial court burden of at least creating a dispute about effect on the market. Having failed to do so below, Acuff-Rose cannot ask this Court to grant it summary judgment based upon conjectural marketplace theory. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (no genuine issue of fact exists when non-movant fails to

respond to summary judgment with evidence to support its claim).[1]

The Sixth Circuit sought to finesse the evidence by supplanting the unrebutted proof with the presumption of economic harm, citing *Sony* and *Harper & Row*. In the context of parody those cases do not carry the weight assigned them .

II.

2 LIVE CREW'S "PRETTY WOMAN" WAS A PARODY. IT DID NOT TAKE TOO MUCH, AND THE NATURE OF PARODY FAVORS A FAIR USE FINDING UNDER THE FOUR STATUTORY FACTORS.

A. The Purpose and Character of Petitioners' Use of Copyrighted Material from Respondent's Song Was to Create a Legitimate Parody.

The Sixth Circuit suggests a virtually irrebuttable presumption that a "commercial" parody is not a fair use. Respondent attempts to justify this presumption as appropriate when the "user is capitalizing primarily on the commercial appeal of the copyrighted material itself." Respondent's Br. at 22. The

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1. The Respondent demanded that the trial court convert 2 Live Crew's Motion to Dismiss into a Motion for Summary Judgment. J.A. 105. Respondent argued the existence of issues of material facts (J.A. 106-135), but did not support the argument with evidence. The "declarations" of Respondent's musicologist Earl Spielman and Acuff-Rose licensing Director Gerald Teifer did not counter Oscar Brand's affidavit that the parody would only "stimulate interest in the original." J.A. 35. Spielman was silent on market effect. J.A. 142-144. Teifer only speculated: "*If* the 2 Live Crew's derivative work *should become* widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it." J.A. 144 (emphasis supplied).

If there is a doubt about effect on the market in this parody case, a trial, not presumption or conjecture, should govern the fair use decision.

Sixth Circuit, however, offered no such limitation but concluded simply "that the admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use." J.A. 354. Respondent's construction of this presumption, although narrower than the Sixth Circuit's interpretation, nevertheless demonstrates a fundamental misunderstanding of the nature and purpose of parody and has no factual basis in the record.[2]

1. Intent to unfairly exploit the underlying work cannot be presumed from a parody's commercial purpose.

The purpose of parody is to comment or criticize using recognizable material from a popular, *i.e.*, commercially successful, existing work — comment or criticism is not effective if the audience does not know what is being commented on or criticized. A parody also may be commercially successful,[3] and some of that success may derive from the popularity of the underlying work, just as a movie or music review owes part of its audience to the work it critiques. But such commercial appeal of a

2. Respondent contends that Petitioners bear the burden of proof on whether "Pretty Woman" is a fair use of material from "Oh, Pretty Woman." Respondent's Br. at 21. Although styled as an affirmative defense, fair use is also a mixed question of law and fact. *Harper & Row*, 471 U.S. at 561. A fair use proponent's "burden," therefore, is at best uncertain and in the context of parody or other commentary or criticism should be limited to introducing facts sufficient to demonstrate that the copyrighted material was used productively in a legitimate parody. The copyright owner should then be required to demonstrate that the use was nevertheless unfair.

3. Indeed, many artistic classics of literature, including the works of Aristophanes, Chauser, Shakespeare, Alexander Pope, Jonathan Swift and Henry Fielding, were parodies that have been far more successful than the original works parodied. *See, e.g., Note, But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465 n.2 (1992) (discussing such works).

parody may be an inevitable result when a popular work is the target, and that appeal does not make the parody "an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). As the Second Circuit recently observed:

> A copyright holder's protection of its market for derivative works of course cannot enable it to bar publication of works of comment, criticism, or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work. The [copyright holder] cannot preserve for itself the entire field of publishable works that wish to cash in on the . . . phenomenon [of the original work's popularity].

Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 61 U.S.L.W. 2784, (1993 WL 194301 at *9), __ F.2d __ (2d Cir. 1993).

As a productive use of copyrighted material, a parody adds to the original to create a new work. Some or all of a parody's commercial success may be attributable to the originality of the parodist. The productivity of the use thus may be the source of the parody's commercial appeal, rather than the previous success of the existing work. Many of those who bought the 2 Live Crew album, of which "Pretty Woman" is only a part, undoubtedly did so because they were familiar with the artists, enjoyed the other songs on the album, or liked the humor and critical treatment 2 Live Crew added to the material used from Respondent's song. The critical inquiry thus should be whether the parody makes a productive use of the original. Simply presuming that a "commercial" parody is an unfair use ignores both parody's need to incorporate recognizable material into its comment or criticism and the difficulties of segregating the commercial appeal of the parody's contribution from that of the existing work.

The Respondent, unlike the Sixth Circuit, may argue only that the first factor should weigh against a finding of fair use when the court determines that the *primary* purpose of the use was to exploit the material in the underlying work rather than to incorporate and transform that material into a new and original work of comment or criticism. Such a determination, however, cannot simply be presumed from the commercial nature of the parody but must be supported by a factual record. The record below supports no such determination.

> 2. *The record contains no evidence that 2 Live Crew is primarily profiting from the commercial appeal of Respondent's copyrighted song.*

No evidence in the record supports Respondent's contention that, rather than enjoying a legitimate parody's commercial success, "2 Live Crew is primarily profiting from the commercial appeal of the copyrighted song." Respondent's Br. at 25. Neither the district court nor the Sixth Circuit found that Petitioners' "use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right[s]." *Harper & Row*, 471 U.S. at 562 (emphasis in original). Respondent nevertheless attempts — through innuendo, questionable generalizations from case law, and unsupported assertions — to contest that Petitioners used portions of "Oh, Pretty Woman" as part of a legitimate parody.

Respondent baldly asserts that "Pretty Woman" was marketed as the copyrighted work itself, but the facts do not support that assertion. The credit given to Orbison/Dees and Acuff-Rose on the album is entirely consistent with Petitioners' unsuccessful attempt to secure a license to use portions of the copyrighted work. J.A. 84-87. "Moreover, to consider [Petitioners] blameworthy because [they] asked permission would penalize [them] for this modest show of consideration. Even though such gestures are predictably

futile, [courts] refuse to discourage them." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Petitioners also should not be precluded from parodying a copyrighted work simply because they are a popular rap group rather than a parody ensemble. Coors Brewing Company, for example, is not a parody ensemble, but its use of portions of Eveready's "Energizer Bunny" advertisements in a commercial parody advertising its beer was a fair use. *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991). Nor should Petitioners be required to specifically identify their work as a parody to be entitled to fair use protection. Literary works frequently incorporate parodies of other works without identifying them as parodies. James Joyce's *Ulysses*, for instance, includes

> a series of parodies covering many types of literature, from the most primitive to what was in Joyce's day fully contemporaneous. The satiric purpose of *Ulysses* (insofar as it is a satire, for the book is many other things as well) is to make mockery of the notion that modern Ireland is a heroic country nourished by noble epic traditions, and to show it as a comical province on the outer fringes of the world of true civilization.

G. Highet, *The Anatomy of Satire* 110 (1962). Indeed, the entire point of parody is to employ humor and the use of recognizable material from popular works so that the audience does not need to be told that it is hearing or seeing a parody or what work is being parodied. Respondent did not offer — nor does the record contain — any evidence that Petitioners intended or their audience believed that "Pretty Woman" was anything but a parody of "Oh, Pretty Woman."

B. The Nature of the Copyrighted Work Should Be a Neutral Factor in the Context of Parody.

Respondent maintains that because "Oh, Pretty Woman" is an original creative work, this factor should weigh against a finding of fair use,[4] but a mechanical application of this fair use factor disregards parody's unique use of copyrighted material. The nature of the copyrighted work should be a neutral factor in determining the applicability of the fair use doctrine to a parody, to the extent it is considered at all. *See Fisher,* 794 F.2d 432 (ignoring this factor in parody fair use analysis); *accord Berlin v. E.C. Publications, Inc.,* 329 F.2d 541 (2d Cir. 1964); *Elsmere Music, Inc. v. National Broadcasting Co.,* 482 F. Supp. 741 (S.D.N.Y.), *aff'd,* 623 F.2d 252 (2d Cir. 1980); *see Triangle Publications v. Knight-Ridder Newspapers,* 626 F.2d 1171, 1176 (5th Cir. 1980) ("the fact that TV Guide is a commercial publication neither supports nor hurts Knight-Ridder's claim that a fair use defense is appropriate" in use of the magazine's cover in comparative advertisement). Works of fact and fiction should be equally subject to commentary or criticism on that work or its themes. That "Oh, Pretty Woman" is a work of fiction or fantasy rather than of fact, therefore, should be irrelevant to whether Petitioners' parody of that work is a fair use.

C. Analysis of the Amount and Substantiality of the Use Must Recognize the Unique Need of Parody to Incorporate and Transform to Create an Original Work.

Regardless of the formulation of the third statutory factor —

4. In addition, Respondent claims that the adaptability of a song to different markets also should be considered under this factor. To the extent this "adaptability" is relevant at all, however, it would impact the effect of the use on the market for or value of the copyrighted work, not the nature of the work. This argument thus is discussed in connection with the fourth statutory fair use factor, *infra* at 11-13.

whether termed as "conjure up,"[5] "reasonably necessary to achieve a parodic purpose,"[6] or "builds upon the original . . . contributing something new for humorous effect or commentary"[7] — the underlying reason for assessing the amount and substantiality of the use of copyrighted material in a parody should be to determine whether the use was productive. A parodist should be able to "'fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism'" or comment. *Harper & Row,* 471 U.S. at 550 (quoting *Folsom v. Marsh,* 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901)). "[I]f the quoted material is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." Leval, *Toward a Fair Use Standard,* 103 Harv. L. Rev. 1105, 1111 (1990) (identifying parody as an example of such use); *accord Twin Peaks Prods.,* __F.2d at __ (1993 WL 194301 at *6 & *9). Analysis of the "amount and substantiality" factor must include a recognition that the art of parody requires use of identifiable portions of copyrighted material to create new and original works.

Respondent's application of the "amount and substantiality" factor ignores the natural function and structure of parody, despite Respondent's claims to the contrary. "Although the amount taken is a factual issue susceptible of proof, it is a question of law whether the taking is excessive under the circumstances." *Fisher,* 794 F.2d at 438 n.4. As a matter of law, Petitioners made a productive use of the material from

5. *Walt Disney Productions v. Air Pirates,* 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979).

6. *Fisher,* 794 F.2d at 439.

7. *Elsmere,* 623 F.2d at 253 n.1.

Respondent's song and did not use an excessive amount of copyrighted material in their parody. The guitar riff and the line "Pretty Woman" are the recognizable parts of Respondent's song (J.A. 84) and obviously would be included in any parody of the song — no one would understand the parody if only an obscure bass line or snippet of harmony were used to identify it.[8] Even if these portions represented the "heart" of "Oh, Pretty Woman," using them in the parody only ensured that the audience would readily recognize the work being parodied. *See, e.g., Elsmere Music*, 482 F. Supp. at 744, 747 (musical phrase and lyrics "I Love New York" was "the heart of the composition" but its use "cannot be said to be clearly more than was necessary to 'conjure up' the original").

Nor should 2 Live Crew have been limited to the bare minimum needed to identify Respondent's song. *See Fisher*, 794 F.2d at 438 n.4 (rejecting composers' argument that the parodist could have conjured up the song using only the first five notes and the words "when Sunny gets blue"). The parody includes the meter and some of the music of "Oh, Pretty Woman," but the incorporated elements serve only to contrast the existing work with the parody. *See Berlin*, 329 F.2d at 545 ("the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized").

Like the parodies in *Berlin*, "Pretty Woman" was created primarily by combining new lyrics with the original's meter. As a rap song, "Pretty Woman" incorporated less of the music from Respondent's song than would be used in other styles of musical parody, and it altered much of what was used. For example, Petitioners' parody repeats the distinctive guitar riff to invoke the original, then parodies that riff by altering it. J.A. 32. Such use of

8. Respondent asserts that the guitar "riff is in fact what drives the 2 Live Crew song and gives it life and commercial appeal." Respondent's Br. at 34. Respondent offered no evidence to support this erroneous characterization of Petitioner's parody, and the record is devoid of any such evidence.

music is not a commercial appropriation, but rather is necessary to any parody. *See Fisher*, 794 F.2d at 439 ("[i]f the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience"). The defendant in *Fisher* used 29 seconds of music for a 29 second parody, and he copied the music verbatim, changing only a few of the lyrics. Petitioners used far less than three minutes of the original's music for a three minute parody,[9] altered much of that music, and changed virtually all the lyrics, to comment on and criticize the underlying work. Such a productive use as a matter of law was not excessive.

D. Petitioners' Parody Has No Effect on the Potential Market for, or Value of, Respondent's Work.

As "undoubtedly the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, any presumption of harm to the copyright holder under this factor would eliminate parody that is sufficiently critical that the holder declines to license it. Respondent alleges this presumption is reasonable because "[w]here the user is exploiting the commercial appeal of the copyrighted work itself, the most logical inference is that the copyright owner also could market the work to the same consumers." Respondent's Br. at 37. A legitimate parody, however, is not "exploiting the commercial appeal of the

9. As the court in *Fisher* recognized, musical parody is an art form that requires substantial use of an existing work. 794 F.2d at 439. Indeed, courts have upheld nearly verbatim use of an entire song to parody the recognized performer of that song. *See Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y. 1909); *Green v. Mitzensheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909); *Bloom & Hamlin v. Nixon*, 125 F. 997 (C.C.E.D. Pa. 1903). Petitioners cannot have used an excessive amount of material from Respondent's work when they used less than the optimum amount necessary to create the best parody of "Oh, Pretty Woman." (*See* J.A. 281 & 286 ("2 Live Crew may not have created the best parody of the original," but "the medium is song, its purpose is parody, and the relative brevity of the copying" support fair use).)

copyrighted work itself." *See* discussion, *infra,* at 14. Respondent's analysis of the fourth statutory factor again ignores the fundamental nature of parody and defines the "potential market" for a copyrighted song so expansively that no parody of a musical work could ever be a fair use.

According to Respondent and the Sixth Circuit, injury to Respondent's copyright should be presumed based on the potential effects of the parody on the market for derivative works. One such market identified by Respondent is the licensing of music parodies. The record, however, utterly lacks any evidence that a viable market exists for licensing music parody. Even if some music parodies are produced pursuant to a license, the copyright holder should not be able to censor commentary on or criticism of its work by licensing only those parodies of which it approves.[10] Not only is "[s]elf-esteem . . . seldom strong enough to permit the

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10. Respondent points to the recordings of "Weird Al" Yankovic as examples of music parodies produced pursuant to a license from the copyright holder. (J.A. 325) Unlike Petitioners' parody, however, none of these parodies appear to be critical of the underlying work or recording artist, nor do they comment on any controversial issues, so that the copyright holder would be unlikely to license them. Parody would not long survive as a unique and valuable art form if it were limited to such bland treatment of popular musical works and their themes.

The existence of a fair use defense for parody, moreover, should enhance the market for creating and licensing derivative works that use portions of copyrighted musical compositions. Copyright owners will be more inclined to grant a license when requested if the artist creating the derivative work may be able to claim fair use without such a license. The artist, on the other hand, will be encouraged to seek such a license if any doubt exists about whether the derivative work legitimately comments on or criticizes the copyrighted work or its themes. A freer, more expansive market is a likely result of this equalized bargaining power, in contrast to Respondent's alleged "market" in which copyright owners wield absolute power and the ability to veto creative and productive uses of their works for little or no reason.

granting of permission [for a parody] even in exchange for a reasonable fee," *Fisher,* 794 F.2d at 437, but the copyright holder naturally will seek to protect and enhance commercial demand for its work. "Biting criticism suppresses demand," *id.* at 438, and thus the copyright holder has both a personal and economic incentive to censor such criticism. Respondent, for example, flatly stated that it "cannot permit the use of a parody of "Oh, Pretty Woman"." J.A. 89. Requiring parodies to be licensed by the copyright holder would encourage such censorship and would silence critical voices in the marketplace of ideas guaranteed by the First Amendment.[11]

Respondent also alleges harm to the ability of "Oh, Pretty Woman" to compete in the rap music market, but no basis exists to presume that Petitioners' parody has had any adverse effect on Respondent's ability to license or create a rap version of its song. No evidence in the record supports an inference that a rap *parody* of "Oh, Pretty Woman" will negatively affect the market for a rap *adaptation* of Respondent's song. To the contrary, the record demonstrates that another rap group approached Respondent to license "Oh Pretty Woman" for inclusion in a rap song *after* Petitioners' parody was released. J.A. 326-27. As a matter of fact and law, Petitioners' parody has not adversely affected the potential market for, or value of, Respondent's song.

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11. Indeed, any use of copyrighted material *could* be licensed, including the plot and dialogue from motion pictures or music and lyrics from recorded music for use in television, radio, or newspaper reviews. Such reviews are "blatantly commercial" and criticize the expression rather than solely the ideas in the underlying work, but no court has denied fair use protection to criticism of popular artistic works by recognizing a market for licensed criticism. Such protection arises as a result of sensitivity to First Amendment concerns as much as to copyright's purpose of encouraging artistic creation.

III.

LEGITIMATE PARODY IS A UNIQUE ART FORM THAT DESERVES SPECIFIC PROTECTION UNDER THE FAIR USE DOCTRINE.

" 'Parody by its nature demands close imitation.' " (J.A. 370) (quoting Bisceglia, *Parody and Copyright Protection*, ASCAP Copyright Law Symposium No. 34 at 17 (1987)). " '[P]arodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author.' " *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986) (quoting Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1411 (1984)). Moreover, "parody can rise to the level of the best literature, at times outliving the works it parodies." Note, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 465 n.2 (1992). Petitioners urge the Court to recognize that parody's unique nature and social importance require that the fair use doctrine be tailored to ensure proper protection for legitimate parody.

Contrary to Respondent's assertion, Petitioners would not have this Court abandon a case-by-case analysis of fair use or ignore its decision in *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Petitioners recognize the importance of copyright protection and do not advocate a blanket exemption from the copyright laws for any work that might loosely fit some nebulous definition of "parody." Rather, Petitioners submit that the fair use doctrine is by its very nature flexible and evolving and should be applied to protect and encourage creation of legitimate parodies and to accommodate the First Amendment's interest in fostering an open marketplace of ideas.

A. Recognition of Protection for Parody Furthers the Goals of the Copyright Act.

Respondent mischaracterizes Petitioners' position by claiming that they seek a presumption that any work that can imaginatively be termed a "parody" is automatically entitled to fair use protection. Petitioners advocate no such radical departure from the copyright laws. Rather, Petitioners submit that the statutory fair use factors — at least as interpreted by the Sixth Circuit — are ill-equipped to deal with the need to incorporate material from copyrighted works in the creation of new original parodies. The suggested "presumption" is that *legitimate* parody is entitled to fair use protection, and the statutory fair use factors should be construed in light of parody's unique nature whenever a claimed parody is alleged to infringe a copyright holder's rights. Petitioners thus would have this court "resolve these issues as best [it] can in the light of ill-fitting existing copyright law." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 457 (1984) (Blackmun, J., dissenting).

1. Petitioners' parody satisfies even the most narrow definition of "parody."

As all parties and *amici* have pointed out, no legal definition of "parody" exists. Respondent asks the Court to depart from dictionary and artistic tradition and to define parody as only those works that incorporate some critical comment about the original work. Respondent's Br. at 13. Such a standard, however, would eliminate protection for a vast number of parodies — many of which have previously been protected by other courts — that comment on the themes of the copyrighted work or use that work or its themes to comment on or criticize issues or individuals of public importance. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam); HBO Br. at 5-7; Capitol Steps Br. at 15-17.

Petitioners' work, however, satisfies even Respondent's narrow view of parody. The record contains substantial evidence that "Pretty Woman" was intended to and does satirize Respondent's song. J.A. 31-35, 84, 87, 95. Respondent introduced no evidence to the contrary and thus cannot now claim the existence of an issue of fact. *See Celotex*, 477 U.S. at 324. The district court specifically concluded that "Pretty Woman" parodied "Oh, Pretty Woman." J.A. 279-83. The Sixth Circuit majority questioned whether Petitioners' parody targeted the copyrighted work itself but accepted the district court's conclusion that "Pretty Woman" is a parody. J.A. 351. This Court presumed Petitioners' work was a parody when it stated the question presented. As a matter of fact and law, therefore, Petitioners' "Pretty Woman" is a parody.

2. *Section 115 of the Copyright Act governing compulsory licenses is consistent with fair use protection for commercial parody.*

Parodies of musical works are entitled to no less protection than parodies of other copyrighted works. Respondent contends that the compulsory license for musical works mandated in section 115 of the Copyright Act limits fair use protection for parodies of musical works. That section, however, specifically governs "arrangements" of musical works and does not even address musical parodies. 17 U.S.C. § 115(a)(2). An "arrangement" is "an adaptation of a musical composition by rescoring." Webster's New Collegiate Dictionary 62 (1981). A parody is not an adaptation but is a comment or criticism that uses material from an existing work. Section 115, therefore, is irrelevant on its face to analysis of the proper level of protection to which parody is entitled.

Respondent nevertheless claims that Congress intended section 115 to limit parodies of musical works to allow authors to prevent their *works* from being "perverted, distorted, or

travestied." Respondent's Br. at 16 (emphasis added). Congress' concern in section 115, however, was distortion of the work's *music* during rescoring under a compulsory license, not travesties of the musical work as a whole which would not even be eligible for a compulsory license.[12]

Even if Congress was concerned with distortion of copyrighted musical works, not every distortion or travesty of a copyrighted song is a parody. Congress expressly provided for protection of parodies in section 107 and was fully aware of the existence of, and historic protection afforded to, parodies of musical works.[13] Construing the statute as a whole, a legitimate parody that "distorts" or "travesties" a copyrighted musical work or its themes is a fair use under section 107, but a distortion or travesty that does not parody that work or its themes requires a license from the copyright holder under section 115. Section 115 provides no limitation on the protection available for parodies of musical works and, when properly construed in conjunction with

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12. In context, the legislative history provides,

> The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make *arrangements* of music being used under a compulsory license, but without allowing the *music* to be perverted, distorted, or travestied.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5724 (emphasis added).

13. Legitimate parody in general and parody of musical works in particular was protected as a fair use long before Congress codified the doctrine in 1976, *see, e.g., Berlin*, 329 F.2d 541 (protecting parody of musical works and decided in 1964), and "[s]ection 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5680.

section 107, demonstrates Congressional recognition of parody as fair use.

B. The Fair Use Doctrine Accommodates Parody's Contribution to the Marketplace of Ideas Protected by the First Amendment.

The freedom to comment on and criticize persons or matters of public interest and concern is a fundamental First Amendment value. Parody exercises that freedom in a uniquely effective way; accordingly, courts have used the First Amendment to protect works of parody. *See, e.g., Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (First Amendment precluded public figure from recovering damages for emotional distress arising out of parody of him). Respondent would have this Court ignore parody's vital importance to the marketplace of ideas, but fair use must be informed and shaped by the First Amendment.

Respondent relies on the decision in *Harper & Row* for its claim that First Amendment analysis of parody is unnecessary.[14] In that decision, however, the First Amendment issue was whether the public's interest in learning news about matters of public importance as fast as possible outweighed the right of an author to control that news' first publication. Under those circumstances,

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14. Respondent also claims that its property interest in its expression distinguishes this case from First Amendment cases involving libel and flag-burning. Respondent's Br. at 20. Respondent, however, cannot seriously contend that its interest in maximizing economic return on its creativity is more compelling than an individual's reputation and career or the American public's deeply-rooted reverence for its national symbol. Nor does parody represent content regulation of speech or threaten the editorial control and judgment of the press, as was the case in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). Respondent is not being told what to say or publish, only that it cannot prevent others from using material from its copyrighted work to comment on or criticize that work or its themes.

the Court refused "to create what amounts to a public figure exception to copyright" "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas." 471 U.S. at 560.

The First Amendment issue in this case, by contrast, is the extent to which a copyright holder can block use of its work to comment on or criticize that work. The concern thus is not who controls the initial release of information, but whether critical speech will occur at all — a far more fundamental First Amendment concern.

Incorporating First Amendment values into the analysis does not "rigidify" fair use but ensures that the doctrine "balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." *Warner Bros., Inc. v. American Broadcasting Cos., Inc.,* 720 F.2d 231, 242 (2d Cir. 1983). The First Amendment interest in fostering commentary on and criticism of popular artistic works and matters of public concern must weigh heavily in the balance when assessing the proper level of protection for parody.

CONCLUSION

Congress never intended the copyright laws to be used to stifle all commercially successful comment on or criticism of protected works or their themes. The approach advocated by Respondent and its *amici,* however, would have just such an effect. Petitioners and many of their *amici,* like Respondent and its *amici,* have a vested interest in copyright and do not advocate wholesale abandonment of that protection for musical works. Nor do they seek to eliminate the fair use doctrine in the name of protection for any work that can remotely be termed a "parody." Rather, Petitioners seek the freedom to comment on and criticize

copyrighted works and their themes through creative, original works of parody without having to tailor that comment or criticism to the personal sensitivities of the copyright holder. Copyright law and the First Amendment demand no less.

Petitioners' parody is a fair use of Respondent's song. Accordingly, the Sixth Circuit's decision should be reversed, and the district court's ruling should be affirmed.

Respectfully submitted,

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